

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:18CR9-2**

UNITED STATES OF AMERICA)	
)	
v.)	
)	ORDER
DENISE ANN SMITH,)	
)	
Defendant.)	
<hr style="width:40%; margin-left:0"/>)	

This matter is before the Court on Defendant’s “Ex parte Motion To Enforce Compliance With Subpoena” (# 29). Defendant seeks an order from the undersigned requiring Adam Queen (“Queen”), General Manager for American Tactical and Pawn, Inc. (“American Tactical and Pawn”), to show cause why he should not be held in contempt for failure to comply with a subpoena requiring him to produce to Defense counsel “all forms 4473 collected by American Tactical and Pawn, Inc. for the period of February 18, 2015 through February 17, 2017.” (# 24-1, 25)

I. Background

On April 16, 2018, the Court entered an Order (# 30) directing Queen to appear on April 18, 2018, and bring with him all documents outlined in the subpoena (# 30). At the April 18, 2018 hearing, Queen was present, the Government was represented by Assistant United States Attorney John Pritchard, and Defendant was present and represented by her appointed counsel, Eric J. Foster. Also present was Keith M. Cave (“Cave”), Division Counsel for the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”).

At the hearing, Queen appeared without counsel. The Court advised Queen that it would consider appointing counsel to represent him and separate counsel to represent American Tactical and Pawn in the event either, or both, are indigent. Prior to considering the issue of indigency,

Queen advised the Court that he had brought the records requested in the subpoena. In particular, the records consisted of seven bankers' boxes of documents. Queen did not actually bring the documents to the courtroom, but he had them secured in his vehicle parked near the courthouse.

Queen stated that the records he had were required to be maintained by American Tactical and Pawn as a federal firearms licensee. The records are not maintained as digital documents, but they are kept as paper documents. Queen advised the Court that he had looked into the cost of photocopying the paper documents, and the approximate cost would be \$2,000.00. Queen stated that pursuant to ATF regulations, American Tactical and Pawn was required to maintain possession of the documents at all times.

Cave, Division Counsel for the ATF, advised the Court that the information provided by Queen was accurate. Cave further advised the Court that the ATF does not receive or keep the ATF Form 4473. Cave explained that these forms are required to be maintained by the federal firearms licensee and are subject to being inspected by the ATF upon demand.

II. Discussion

The following issues are before the Court: (1) the quantity of documents being requested, (2) the reasonableness of the subpoena, and (3) the issue of counsel for Queen and American Tactical and Pawn.

A. The quantity of documents being requested

The Court made an inquiry of Queen as to whether or not there was any other form of records that were kept by American Tactical and Pawn, which would show the names of purchasers of firearms that would not be as voluminous as the ATF Form 4473. Queen advised the Court that there was a journal referred to as "Acquisitions and Disbursements" that would show the names and addresses of purchasers of firearms from American Tactical and Pawn. The Court directed Queen, as general manager of American Tactical and Pawn, to send the Court a copy of the

Acquisitions and Disbursements Journal of American Tactical and Pawn for the period of thirty (30) business days prior to February 17, 2017, the alleged date of the offense for which Defendant is charged. The Court further directed that Queen to provide copies of the ATF Form 4473 for the period of one week prior to February 17, 2017. It was the intent of the undersigned to conduct an in camera review of these documents. Queen forwarded the documents to the Court as ordered. See (# 32)

An in camera examination of the ATF Form 4473 documents provided to the Court reveals that ATF Form 4473 is a six-page document that requires a firearm purchaser to record and report their name, address, place of birth, date of birth, social security number, weight, height, sex, race, and ethnicity. Also required to be reported on ATF form 4473 are answers to questions concerning criminal history, use of controlled substances, mental condition, and other personal and private information. An additional question requires the production of a driver's license number for the purchaser, as well as the serial number, make and model of the firearm being purchased, and the price of the firearm. ATF Form 4473 of American Tactical and Pawn for the six (6) business days prior to February 17, 2017, consists of approximately 156 pages.

An examination of the Acquisitions and Disbursements Journal shows it is a record kept of the type, model, caliber, serial number, the date of sale or acquisition of firearms, and the name and address of any purchaser of a firearm from American Tactical and Pawn. The Acquisitions and Disbursements Journal for the thirty (30) business days prior to February 17, 2017, consists of six pages.

b. Reasonableness of the subpoena

In the Court's February 19, 2018 Order (# 32) Defense counsel was required to file a brief with supporting case law and statutory authority, which supported the defense that he proposes to present in this matter. Citing United States v. Rahman, 83 F.3d 89 (4th Cir. 1996), Defendant

contends that if a federal firearms licensee (in this case, American Tactical and Pawn) knew at the time of the purchase of the firearm by Defendant that Defendant was acting as a “straw purchaser,” Defendant could have that considered by the trial court as a valid defense. See Def.’s Br. (# 33).

This defense, however, could possibly lead to criminal charges against American Tactical and Pawn and/or one or more of their employees for either a violation of the federal firearms laws or for entering into a conspiracy with Defendant to violate federal firearms laws. For this reason, American Tactical and Pawn and Adam Nelson may have Fifth Amendment privileges that they wish to protect.

Defendant refers to two witnesses that support her argument that American Tactical and Pawn or one or more of their employees knew at the time of the purchase of the firearm by Defendant that Defendant was acting as “straw purchaser.” See (# 32). The Court will have to hear the testimony of these witnesses to determine whether or not the testimony of these potential witnesses supports Defendant’s argument. Moreover, the Court will hear from Defense counsel regarding why Defendant needs the detailed information provided in the ATF Form 4473 documents, as compared to the information disclosed by the Acquisition and Disbursements Journal.

C. Issue of counsel and objections to the subpoena

The Court will allow both American Tactical and Pawn and Queen an opportunity to claim any privileges they may wish to present. Therefore, they will be afforded twenty (20) days from the entry of this Order to file a motion to quash or to claim any privileges either of those entities may wish to present. Should American Tactical and Pawn or Queen contend that either or both of them are indigent and cannot afford to retain counsel, they are directed to present to this Court within seven (7) days from this order an affidavit, which they can obtain from the Office of the Clerk of this Court. The officers and the Board of Directors of American Tactical and Pawn are

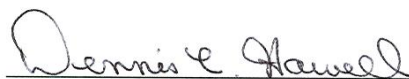
placed on notice that a corporation, such as American Tactical and Pawn, can only appear before this Court through an attorney. See Acme Poultry Corp. v. United States, 146 F.2d 738, 740 (4th Cir. 1945) (“A corporation can appear only by attorney[.]”). To prevent a conflict of interest, separate attorneys must appear for Queen and American Tactical and Pawn.

III. Conclusion

In light of the foregoing, the Court ORDERS the following:

1. American Tactical and Pawn and Queen must either retain counsel or request appointment of counsel. Within twenty (20) days of the entry of this Order, counsel for American Tactical and Pawn and/or Queen may file a motion to quash, or claim any privilege they wish to present;
2. This matter is set for further hearing on 12 July, 2018 at 9:00 a.m. to hear from the witnesses referred to in Defense counsel’s Brief (# 33) and to make a determination regarding the basis and reasonableness of the request for the subpoenaed documents; and
3. This Order will not be ex parte, and the Government will be provided with a copy. The Court will hear from Defense counsel, counsel for the Government, counsel for American Tactical and Pawn, and counsel for Queen regarding the reasonableness of the request made by Defense counsel in the subpoena.
4. The Clerk of this Court is directed to serve a copy of this Order upon Adam Queen and American Tactical and Pawn, Inc. by forwarding a copy to each by United States Mail.

Signed: June 8, 2018



Dennis L. Howell
United States Magistrate Judge

